

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 17, 2008

CASEY L. MYLES v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Marshall County
No. 17785 Robert Crigler, Judge**

No. M2008-01210-CCA-R3-PC - Filed April 2, 2009

The petitioner, Casey L. Myles, appeals the Marshall County Circuit Court's denial of his petition for post-conviction relief from his guilty pleas to five counts of selling one-half gram or more of cocaine, one count of possessing one-half gram or more of cocaine with intent to sell, one count of resisting arrest, and resulting effective twenty-year, three-month sentence. The petitioner contends that he received the ineffective assistance of trial counsel because he thought he was going to receive a sentence of ten years, three months. Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and THOMAS T. WOODALL, J., joined.

John H. Richardson, Jr., Fayetteville, Tennessee, for the appellant, Casey L. Myles.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

We glean the following facts from the petitioner's guilty plea hearing: Between March 23, 2004, and March 5, 2007, a confidential informant set up numerous drug buys with the petitioner. The informant met the petitioner at the arranged locations and bought cocaine from him. Police officers video- and/or audiotaped the transactions. During the last drug buy, the police planned to arrest the petitioner, but he fled on foot. One of the officers caught the petitioner and arrested him. The petitioner was charged with five counts of selling cocaine, four counts of delivering cocaine, one count of possessing cocaine with intent to sell, possessing cocaine with intent to deliver, and

resisting arrest. The petitioner pled guilty to five counts of selling one-half gram or more of cocaine, a Class B felony; one count of possessing one-half gram or more of cocaine with intent to sell, a Class B felony; and one count of resisting arrest, a Class B misdemeanor. Pursuant to the plea agreement, he received an effective sentence of twenty years, three months and was fined two thousand dollars for each felony conviction.

Subsequently, the petitioner filed a timely pro se petition for post-conviction relief, claiming in pertinent part that he received the ineffective assistance of counsel and that he did not enter his guilty pleas knowingly, intelligently, and voluntarily. Regarding his ineffective assistance of counsel claim, the petitioner argued that counsel failed to meet with him about his case, prepare a defense, gather information to attack the State's case, interview witnesses, file a motion to suppress evidence, and investigate possible violations of his constitutional rights. The petitioner also argued that because his case "was simple and not complex, a jury trial was not warranted, and the Petitioner's trial counsel desired a jury trial." Regarding his pleading guilty unknowingly, the petitioner argued that counsel coerced him into pleading guilty and that he was forced to plead guilty due to her ineffectiveness. The post-conviction court appointed counsel, and counsel did not file an amended petition.

At the evidentiary hearing, the petitioner testified that his wife hired trial counsel to represent him. The petitioner was not released on bond but met with counsel when he appeared in court. His only meeting with counsel outside of court occurred in jail the day before his guilty plea hearing. Counsel told him the State had offered a twenty-year sentence in return for his guilty pleas, but the petitioner refused the offer and told her he wanted to go to trial. Counsel told the petitioner that the State would not lower its twenty-year offer, acted like she did not want to try his case, and told him that he would probably get a harsher sentence if a jury convicted him. The petitioner listened to his attorney because he did not know anything about the law and thought counsel was "doing the best for me." Counsel gave the petitioner some discovery materials, but she did not give him any audio- or videotapes, and counsel did not discuss what the State would have to prove in order for a jury to find him guilty. Counsel told the petitioner that the charges carried eight- to twelve-year sentences and that his sentences would run concurrently. Therefore, the petitioner thought his sentence would be eight to twelve years.

The petitioner testified that he "heard two sentences" at his guilty plea hearing. The trial court told him twenty years, but trial counsel told him he would receive two ten-year sentences to be served concurrently. Counsel also told the petitioner that the trial court was "going to read a whole bunch of 10s out, but . . . it was going to be a 10-year sentence." Regarding the petitioner's plea agreement forms, the petitioner said counsel told him to "sign here, sign here, sign here, and that's what I done." He said that although he told the trial court he read the forms, he did not read them. He stated that when the trial court told him his sentence would be twenty years, he did not question the sentence because counsel told him to answer yes to all of the court's questions. He stated that he thought his sentence was going to be ten years, three months. After the guilty plea hearing, the petitioner received his "time sheet" and discovered his effective sentence was twenty years. He sent counsel a letter about the sentence, but she never responded.

On cross-examination, the petitioner acknowledged that he did not sign his post-conviction petition under oath. He also acknowledged that in his petition, he claimed he wanted to plead guilty but counsel wanted him to go to trial. He said his petition was incorrect and that he wanted to go to trial. He said that counsel gave him discovery materials but that she gave the materials to him after his guilty plea hearing.

Trial counsel testified that she was licensed to practice law in 1987 and became licensed to practice law in Tennessee in 1997. Counsel spoke with the petitioner prior to taking his case and was retained to represent him. Counsel met with the petitioner in jail and received discovery. The petitioner had already listened to the audiotapes of the drug transactions and did not want to listen to them again. Counsel also had listened to the tapes. She went over discovery with him and gave him copies of everything. She also told him about his range of punishment, and they talked about his criminal history. The petitioner did not want to plead guilty, did not like the State's twenty-year plea offer, and wanted the State to make a "better deal." He also wanted all of his sentences to run concurrently, but the State refused, and counsel was prepared to try the petitioner's case. She never told him that all of his sentences would run concurrently, and she told him that he would receive consecutive sentencing. The petitioner asked her to negotiate concurrent sentencing for him, and counsel "did everything [she] could to do it."

On cross-examination, counsel testified that she did not file any motions but talked with the petitioner about possible defenses. Based on the facts of the case and the petitioner's criminal history, counsel encouraged him to accept the State's plea offer. She went over the offer with him and said there was no way the petitioner could have thought his effective sentence was going to be ten years. She also went over the plea agreement forms with him, and the forms stated his effective sentence was going to be twenty years, three months. The petitioner could read and write, and he told counsel he understood his plea agreement. Counsel would have tried the petitioner's case if he had not accepted the State's offer, and she believed he got the best offer possible. After the petitioner's judgments were entered, he sent her a letter. Counsel wrote back to the petitioner, but her letter was returned.

The post-conviction court stated that based upon the State's written plea offer, trial counsel's testimony, the plea acceptance forms, and the guilty plea hearing transcript, it did not believe the petitioner's claim that he thought he was going to receive a ten-year sentence. The court noted that the petitioner did not claim in his petition for post-conviction relief that he thought his effective sentence was going to be ten years, three months. To the contrary, the petitioner stated in the petition that he pled guilty in exchange for the twenty-year, three-month sentence, and he first raised the issue about the length of the sentence at the evidentiary hearing. The post-conviction court also noted that the trial court and the parties referred to the petitioner's effective sentence several times during the guilty plea hearing. The court concluded that there was "no question" the petitioner understood the length of his effective sentence and that he pled guilty knowingly, intelligently, and voluntarily. The court denied his petition for post-conviction relief.

II. Analysis

The petitioner contends that he received the ineffective assistance of trial counsel because counsel did not adequately advise him that he was going to receive an effective sentence of twenty years, three months. In effect, he is also arguing that he did not knowingly, intelligently, and voluntarily enter his pleas because he was confused about the length of his sentence. The State argues that the post-conviction court should have dismissed the petition on procedural grounds because the petitioner did not verify the petition under oath. The State also contends that, in any event, the post-conviction court properly denied the petition because the evidence demonstrates the petitioner understood his sentence. We conclude that the post-conviction court properly denied the petition.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court's conclusions of law purely de novo. Id.

"To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). In evaluating whether the petitioner has met this burden, this court must determine whether counsel's performance was within the range of competence required of attorneys in criminal cases. See Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Moreover, in the context of a guilty plea, "the petitioner must show 'prejudice' by demonstrating that, but for counsel's errors, he would not have pleaded guilty but would have insisted upon going to trial." Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998); see also Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985).

To pass constitutional muster, a guilty plea must be made voluntarily, understandingly, and knowingly. Hicks, 983 S.W.2d at 246 (citing Boykin v. Alabama, 395 U.S. 238, 244, 89 S. Ct. 1709, 1713 (1969)); see also State v. Mackey, 553 S.W.2d 337, 341 (Tenn. 1977). To determine the voluntariness and intelligence behind a guilty plea, the court must look to various circumstantial factors, i.e.,

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993).

Initially, we will address the State's contention that the post-conviction court should have dismissed the petition because it was not verified under oath. Tennessee Code Annotated section 40-30-104(e) provides that the post-conviction petition and any amended petition must be verified under oath. In this case, the last sentence of the petition reads as follows: "I hereby certify that the foregoing is true and exact, to the best of my knowledge, information and belief, and that I am entitled to the relief as contained in the Memorandum of Law, under the penalty of perjury." The petitioner then signed the petition, but his statement regarding the truth of the petition was not "notarized by a notary public or acknowledged in the presence of an official." Charles Montague v. State, No. E2000-01330-CCA-R3-PC, 2001 Tenn. Crim. App. LEXIS 692, at *3 (Knoxville, Sept. 4, 2001); see also D.T. McCall & Sons v. Seagraves, 796 S.W.2d 457, 462-63 (Tenn. Ct. App. 1990). At the evidentiary hearing, the State informed the post-conviction court that the petition had not been verified under oath. The post-conviction court determined that the State had raised the issue too late and decided to rule on the petition. Given that the petition was not verified under oath, the post-conviction court would have been justified in dismissing the petition on procedural grounds. However, because the court chose to take sworn testimony from the petitioner and trial counsel and to rule on the merits of the petition, we will address whether the court properly concluded the petitioner did not receive the ineffective assistance of counsel and pled guilty knowingly, intelligently, and voluntarily. See Sexton v. State, 151 S.W.3d 525, 530 (Tenn. Crim. App. 2004).

The petitioner contends that he was confused about his sentence because counsel told him that his effective sentence would be ten years, three months. However, counsel testified that she told the petitioner his sentence would be twenty years, three months, and the post-conviction court accredited counsel's testimony over that of the petitioner. Furthermore, as the post-conviction court noted, the plea agreement forms, which the petitioner signed, specifically stated the petitioner's sentence for each conviction and that his effective sentence would be twenty years, three months. In addition, our review of the guilty plea hearing transcript reveals that the trial court and the prosecutor repeatedly stated that the petitioner's effective sentence would be twenty years, three months. Finally, although the petitioner testified at the evidentiary hearing that he did not question the sentence at the guilty plea hearing because counsel told him to answer yes to all of the trial court's questions, we note that during the court's questioning of the petitioner, the petitioner said yes and no at the appropriate times and stated that he understood his guilty pleas. We conclude that the post-conviction court properly determined the petitioner did not receive the ineffective assistance of counsel and that the petitioner entered his pleas knowingly, voluntarily, and intelligently.

III. Conclusion

Based upon the record and the parties' briefs, we conclude that the post-conviction court properly denied the petition for post-conviction relief.

NORMA McGEE OGLE, JUDGE